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Legal and Economic Challenges to the Business Model of the Television Industry

by JOHN B. MEISEL

I. Introduction

Gaining access to content is critically important for entrance into the television industry; this is a necessary input to become a viable competitor against incumbent video industry players. However, incumbents have the ability and incentive to withhold programming that discourages potential competitors from entering the market. Entrants, built up over a long period of time, confront a symbiotic relationship between traditional content providers and incumbent content distributors. For instance, content distributors possess the incentive and ability to leverage programming relationships to preserve existing business models to disadvantage over-the-top internet competitors that the Federal Communications Commission ("FCC") has identified as online video distributors ("OVDs").

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1. For examples of specific actions taken by incumbents to stop the growth of online video, see Marvin Ammori, Copyright’s Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television, 8 COMMLAW CONSPECTUS 375, 379 (2010) ("[T]he incumbent [Multichannel Video Program Distributors ("MVPDs")] and programmers have engaged in a series of practices to undermine the competitive threat of online video.").

2. According to the FCC, OVD is defined as:

[A]n entity engaged in the business of making available, for free or for a charge, professional video programming delivered over the Internet to end users, through any means of online delivery including, but not limited to, a website, an online or mobile wireless portal, or an aggregator or syndicator of...
OVDs started to offer video online in the mid-2000s, incumbents have stressed the threat they pose to the traditional, highly profitable way the industry conducts business. For example, the attitude of existing video distributors toward the nascent rivals is typified by Time Warner Cable. The leading cable operator’s Chief Operating Officer Landel Hobbs’s comment, “[w]e have to be very careful of stuff like over the top or all video content over the top on the Internet. There is a dual revenue stream that we have to be careful of. Surviving on just advertising is a very tough thing.” Instead, the “stuff” referenced by Mr. Hobbs, although a threat to incumbents in the industry, holds the promise of increasing competition throughout the television industry, leading to increased consumer choice regarding when, where, and on what device to watch video.

There are two main ways for video content distribution incumbents to entrench their power and suppress new competition. First, viewers need access to high-speed broadband lines in the last mile (i.e., local loop) in order to have a viewing experience comparable to that provided by traditional video distributors. High-speed broadband is most frequently provided using a cable modem service owned by cable operators (with limited competition from telephone providers, especially in parts of the nation where fiber-optic cable is deeply deployed into the last mile). In 2010, the FCC implemented openness rules for the last mile, in part to facilitate the growth of OVDs. Despite these FCC rules, incumbents (distributors and programmers) pose a second and more important hurdle to professional video programming such as Apple Company’s iTunes, Comcast’s FanCast Xfinity, Netflix, and Hulu.

See Information and Discovery Request for NBC Universal, Inc., FCC 15 (2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298335A2.pdf. An OVD’s geographic market covers all regions of the nation capable of receiving high-speed internet access service. Id. The definition excludes incumbent video distributors that provide access to content online within existing geographic areas in which they own physical distribution facilities. Id.


6. Id. at 2915.

7. Two of these rules, anti-blocking and antidiscrimination, were vacated by the D.C. Circuit in January 2014 because they imposed per se common carriage obligations on broadband service providers although they were not classified by the FCC as common carriers. On the positive side for the FCC, the Court determined that the Commission had positive authority to enact measures encouraging the deployment of broadband infrastructure. Verizon v. Fed. Commc’ns Comm’n, 740 F.3d 623, 659 (D.C. Cir. 2014).
emerging competitors; they can use their terms and conditions to make access to video content difficult.

In order to explore the avenues available to distribution competitors to gain access to content, the traditional business model, sorted into four major components, for incumbent multichannel video programming distributors ("MVPDs") is explained in Part II. Challenges to the specific components of the business model are examined in Part III. Challenges are analyzed for three main stakeholders: Cable programmers, broadcast programmers, and multichannel video programming distributors. In this part, legal and economic issues involving the demand for access to unbundled networks, new technologies for viewers to watch video, and cases involving regulatory opportunities to increase access to network programming, are examined. Part IV provides a brief conclusion.

II. Traditional Business Model of Pay-TV Providers

Four distinct stages of production characterize the path of video programming to the home:

i. Creation of video programming (this includes film studios and sports leagues, as well as TV and cable production facilities). 8

ii. Compilation of video programming into individual broadcast and cable networks (such as ABC, CBS, NBC, Comedy Central, USA, HBO, and Showtime). 9 Individual networks that dominate viewing hours are generally under the control of one of six giant programmers: NBC Universal (now owned by Comcast), Viacom (which owns Comedy Central, Nickolodeon, and the MTV networks), The Walt Disney Company (which owns ABC and ESPN), News Corp. (which governs all Fox programming, including FX and Fox), Time Warner, Inc. (which includes Warner Bros. and CNN), and CBS Corp. 10

iii. Aggregation of various networks owned by programmers and subsequent distribution of the aggregated/packaged video programming by MVPDs (cable companies [such as Comcast, Time Warner Cable, and Cablevision], satellite companies [Dish Network, and DirecTV Group], and telephone companies [such as AT&T and Verizon]) to pay-TV subscribers. 11 MVPDs generally


9. Id. at 160–74.

10. See generally Ashley Lutz, These 6 Corporations Control 90% of the Media in America, BUSINESS INSIDER (June 14, 2012), http://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6 for an infographic on mass media conglomerates.

11. Annual Assessment, supra note 8, at 174–76.
require viewers to use set-top boxes to access the network programming they have paid to access.12

iv. Physical infrastructure (coaxial cable, copper wire, and satellites) that serves as transmission vehicles to deliver content to the residences of pay-TV subscribers.13

There is a varying amount of competition at each stage of production (horizontal competition) and among major cable MVPDs that own both video distribution facilities and sets of cable networks (vertical integration). Traditional MVPDs operate as integrated providers of stages (iii) and (iv).14 The specific means of distribution vary with the type of video provider.15 Cable operators provide a multichannel video service over a coaxial cable infrastructure (today, a hybrid of coaxial cable and fiber-optic cable).16 Satellite operators provision their service by use of satellites and home receiver devices.17 Telephone companies provide video services using copper wire lines, copper wire/fiber-optic cable, or exclusively fiber-optic cable infrastructure.18

With innovations in broadband and digital technologies becoming widespread in the 1990s, it is now possible to separate/unbundle stage (iii) from stage (iv).19 This enables the physical means of distribution to become a separate, independent product market from the programming content distributed.20 That is, as a result of the convergence of formerly single purpose communications media, video programming can be transported over the Internet (by wireline or wireless connections) to viewers by use of a high-speed broadband connection.21 This integration facilitates independence of services (such as video and voice) from the physical transmission network.

A second aspect of vertical integration that has been a focus of governmental authorities is the ownership of must see programming networks by vertically integrated MVPDs.22 The concern today, discussed in Part III, manifests in the ownership of highly demanded regional sports

12. Id. at 177.
13. Id. at 44–56.
14. Id.
15. Id.
16. Id. at 45.
17. Id. at 51.
18. Id. at 55.
19. Id. at 39–40.
20. Id. at 40.
21. Id. at 43.
22. Id. at 81–82.
networks ("RSNs") by cable operators, such as Comcast and Time Warner Cable. 23

Components of the traditional business model for pay-TV distributors are as follows:

i. Cable networks are sold by a programmer in a bundle that frequently combines high demand and low-demand networks to MVPDs. 24 A cable network has two main sources of revenue. One, a video distributor pays the cable network a monthly per subscriber fee based on the number of subscribers that can access the network. 25 Two, a cable network also generates revenue from selling advertising slots associated with the programming of the network (it often shares some of the advertising revenue with the video distributor). 26 A video distributor usually decides in which tier of service the network will be located. 27 A video distributor determines in which neighborhood of networks (e.g., sports networks, news networks) to position the network. 28 In the confidential contract between a video distributor and a cable network (or its programming representative), there may be a provision that prohibits the network and/or its specific programming from being sold to an online distributor, or discourages such a sale by including financial incentives. 29 A most favored nation clause may be included, stating that if the network provides a lower fee to another video distributor, that lower fee will be applied to the video distributor in question. 30

ii. MVPDs are either subject to a must carry rule for a local broadcast network (with no payment for the signal required), or, if elected by a local broadcast network, engage in retransmission consent negotiations to determine the terms of the distribution agreement.

23. Id. at 171.

24. For example, according to a complaint by Cablevision, Viacom, one of six powerful programmers, sells a bundle of eight high demand (core networks) with fourteen low-demand networks (otherwise known as "suite networks"). See Amended Complaint, Cablevision Sys. Corp. et al. v. Viacom Int'l Inc. et al., 2013 No. 13 CIV 1278 (LTS) (JLC) WL 4828947 (S.D.N.Y. July 16, 2013) [hereinafter Cablevision Complaint]. According to Cablevision, it will not sell access to, in lieu of a huge penalty, the core networks separately from the suite networks. Id.

25. Id.

26. Id.

27. Annual Assessment, supra note 8, at 46.

28. Id. at 51–55.


for permission to transmit the broadcaster’s signal.\textsuperscript{31} Historically, commercial broadcast networks relied predominantly on advertising revenue generated by time slots inserted before, during, and after scheduled programs that were sold to advertisers.\textsuperscript{32} More recently, retransmission fees have become an increasing source of revenue for broadcast networks.\textsuperscript{33} These are similar to the fees paid to cable networks because they involve a per subscriber monthly payment. A MVPD must either pay the local broadcaster or forgo the distribution of that local broadcaster’s signal.\textsuperscript{34} MVPDs are not allowed to import a distant broadcast signal offering comparable network programming into a local station’s geographic coverage area.

iii. To a large extent, MVPDs control what networks they provide, establish the different tiers of service, and the price of each tier where a tier represents a bundle/package of networks available to the subscriber. MVPDs generate revenue through monthly subscription charges and advertising.\textsuperscript{35} For example, an MVPD offers various tiers of service starting with basic cable service, which includes local commercial and noncommercial broadcast networks and public, educational, and governmental channels.\textsuperscript{36} Expanded basic service adds to basic service access to a large bundle of cable networks.\textsuperscript{37} Also, a viewer can add to the basic and expanded basic packages by selecting premium networks such

\begin{itemize}
  \item \textsuperscript{31} \textit{Annual Assessment, supra} note 8, at 104–05.
  \item \textsuperscript{32} See id. at 74–75 and accompanying footnotes.
  \item \textsuperscript{34} See Karl Bode, 2013 \textit{Had Most Retransmission TV Blackouts on Record}, DSL REPORTS (Jan. 7, 2014), http://www.dslreports.com/shownews/2013-Had-the-Most-Retransmission-Tv-Blackouts-on-Record-127277. Retransmission disputes resulting in some period of time where the broadcast network was blacked out to the MVPD’s viewers reached a record level (127) in 2013. Id. In 2012, there were ninety-one, in 2011, there were fifty-one, and, in 2010, there were twelve. Id.
  \item \textsuperscript{35} There is a small percentage of revenue generated by pay-per-view opportunities presented to pay-TV subscribers. See David Waterman & Sangyong, \textit{Broadcasters vs. MVPDs: Economic Effects of Digital Transition on Television Program Supply} (Aug. 2009), http://www.indiana.edu/~telecom/people/faculty/waterman/BroadcastersvsMVPDs-DW.pdf.
  \item \textsuperscript{36} \textit{Annual Assessment, supra} note 8, at 46.
  \item \textsuperscript{37} Id.
\end{itemize}
as movie networks and specialized sports networks.\textsuperscript{38} Traditionally, the programming on each network is offered at a scheduled time (called linear programming) with no input from viewers.\textsuperscript{39} Significantly, the invention of the video cassette recorder in the 1970s and a subsequent Supreme Court decision\textsuperscript{40} (the 1984 Betamax ruling in which the Court permitted use [since the action was deemed legitimate fair use] of a recording device to time-shift viewing) allowed viewers to record programs in their homes and watch them on their own time.\textsuperscript{41} Recording of programs also enables, to the great fear of advertisers and the television industry in general, the viewer to unbundle (by skipping) the ads from the program content. The technological innovation and accompanying legal decision were a first step in giving a viewer control over his/her video experience.

iv. An important part of the business model is the regularly scheduled presentation of the programs on a network. Typically, popular shows are broadcast on a network once a week, with twenty-two new episodes of the show airing over the course of a season and the network may rerun the episodes of the prior season before starting the next season.\textsuperscript{42} The television and movie industries make wide use of a windowing process that tries to segment the viewing audience based on a willingness to pay theory that is related to the proximity to the first airing of the content.\textsuperscript{43} Normally, the longer a video distributor is willing to wait to sell the content (such as an episode of a show), the lower the content price.\textsuperscript{44} In addition to scheduled programming, and in response to consumer demand, MVPDs are airing more of the programming using an “on-demand” model. In this model, the video operator stores past episodes (of the current season and/or prior seasons) of programs, movies, and other programming so that a viewer can watch the content on his or her own time.\textsuperscript{45}

\textsuperscript{38} Id.
\textsuperscript{39} Id. at 8.
\textsuperscript{40} Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
\textsuperscript{41} Id. at 456.
\textsuperscript{42} Annual Assessment, supra note 8, at 166.
\textsuperscript{43} Id. at 124–25.
\textsuperscript{44} Id. at 112–13.
\textsuperscript{45} Id. at 4, 126.
III. Challenges to the Pay-TV Traditional Business Model

Recent events indicate that almost all of the components of the traditional business model are being challenged legally by new entrants, and even by incumbents, which creates a great deal of conflict and uncertainty in the television industry. This part identifies and examines cases and events that reveal cracks in the structure of the traditional business model. In particular, challenges are organized according to which stakeholder of the business model is most directly affected: Cable programmers, broadcasters, or MVPDs.

A. Challenges to Cable Programmers

Major programmers' bundling practices and other business models have been subjected to legal attacks and political scrutiny. For example, in Brantley v. NBC Universal, Inc., a class action in which cable and satellite subscribers unsuccessfully challenged the combined bundling practices of major programmers and MVPDs.46

The plaintiffs modeled the bundling practices of the major programmers in the form of a tying agreement; the tying product being the high demand networks and the tied product being the low-demand networks.47 Under the tying agreement video distributors and thus consumers are forced to purchase a much larger set of networks instead of just those that they actually have a willingness to pay for, if given the option.48 Programmers often have the leverage to insist that even low-demand networks be placed on the most commonly purchased tier.49 It is estimated, using data based on the Canadian experience where consumers have a greater ability to choose networks on an à la carte basis, that "the total welfare losses from forced bundling are likely to be in the range from $28 billion to $41 billion annually."50 The plaintiffs argued that all major programmers (those controlling access to programming networks with the

46. 675 F.3d 1192 (9th Cir.2012).
47. Id. at 1200.
48. Id.
49. One economic reason for why a video programmer ties low-demand to high-demand networks is to capture consumer surplus by means of price discrimination. "Employing a devise known as inter-product price discrimination, programmers group together a bundle of channels knowing that, given diverse preferences, there will likely be at least one channel in the bundle to which a consumer will have intense loyalty and a corresponding willingness to pay a high price." See Warren S. Grimes, The Distribution of Pay Television in the United States: Let an Unshackled Marketplace Decide, 5 J. INT'L MEDIA & ENT. L. 1, 7 (2014).
50. Id. at 42. According to Professor Grimes, specific components of overall welfare losses arising from forced bundling were attributable to the following factors: (a) A wealth transfer injury since consumers paid supracompetitive prices for television; (b) an output reduction since some consumers did not subscribe given the supracompetitive prices; (c) a reduction in consumer choice; and (d) a reduction in competition among video distributors. Id.
greatest demand) made use of tying arrangements revealing a pattern of parallel conduct that video distributors and consumers could not escape.\textsuperscript{51}

The Ninth Circuit dismissed the antitrust complaint on grounds that a tying complaint under section 1 of the Sherman Act must allege that the tying practice foreclosed upstream independent programmers from the tied market in order to demonstrate injury to competition (and not merely injury to consumers).\textsuperscript{52} The plaintiffs did not, nor felt it necessary to, make such an allegation.\textsuperscript{53} The court disagreed and framed the complaint as solely about consumers being forced to pay higher prices to purchase cable networks that they would have preferred not to purchase.\textsuperscript{54} According to the court, this, by itself, was not an injury to competition.\textsuperscript{55}

A second legal case brought by a cable MVPD involving the bundling practices of a major video programmer—\textit{Cablevision Systems Corp. v. Viacom International Inc.}—is now underway and stands a better chance of disrupting the practice of forced bundling.\textsuperscript{56} Since the Cablevision complaint against Viacom does include an upstream foreclosure allegation, it holds the potential to restructure the marketing model for a programmer’s cable networks.\textsuperscript{57} Cablevision argues that the goal of a video distributor is to offer subscribers a set of networks through use of a tiering structure that makes the product offerings as attractive as possible.\textsuperscript{58} A MVPD’s creation of tiers/packages is subject to constraints such as: Tiering requirements imposed by programmers; limitations on the bandwidth available for video programming; regulatory requirements such as must-carry obligations; financial limitations of the specific video distributor; and competitive factors, such as the need to provide commercially critical networks,\textsuperscript{59} to be seen as a viable option in the eyes of pay-TV customers.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{51} Brantley, 675 F.3d at 1200.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id. at 1203–04.
\item \textsuperscript{55} Id.; see also Joseph Adamson, \textit{Ninth Circuit Affirms Dismissal of Cable-and-Satellite-TV Channel Bundling Case}, \texttt{ANTITRUST UPDATE} (May 31, 2012), \texttt{http://antitrust.weil.com/articles/ninth-circuit-affirms-dismissal-of-cable-and-satellite-tv-channel-bundling-case}.
\item \textsuperscript{56} \textit{Cablevision Complaint}, supra note 24.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} According to Cablevision, core networks are a necessary (must-have) component of their video product offerings since if they were not included, “a substantial number of subscribers would likely abandon [or refuse to consider] Cablevision and instead chose to receive video services from one of Cablevision’s numerous competitors.” Id. Examples of commercially critical networks include ESPN, the four major broadcast networks, and the Discovery network. \textit{Cablevision Complaint}, supra note 24. According to Cablevision, suite networks do not possess this must-have characteristic. Id.
\item \textsuperscript{60} Id.
\end{itemize}
Tying low-demand networks to high-demand networks prevents any video distributor from carrying other networks that would better match its subscribers' preferences, and enables the distributor to differentiate its product offerings, make better use of scarce programming dollars, and better utilize limited bandwidth. However, Cablevision argues that other MVPDs are subject to the same forced bundling practice from Viacom as they confront. From an antitrust law perspective, eliminating forced bundling would lower barriers to entry for independent networks that compete with the low-demand networks (the tied product) for money and space on an MVPD system. Viacom counters by arguing that it does make the core networks available to Cablevision as a distinct product. Cablevision rebuts this point by saying that it would face a ten-figure penalty to carry just the core networks, compared to what they would pay for the bundle of core and suite networks. Thus, in the view of Cablevision, Viacom's proposal to provide access to only the core networks is economically nonsensical.

Compared to Brantley, this complaint has a better chance of succeeding on its legal merits for two reasons. First, the complaint alleges upstream foreclosure of independent networks from needed modes of distribution, which creates a barrier to entry. This directly addresses the Ninth Circuit's criticism of the omission of a foreclosure claim, and thus an injury to competition in Brantley. Second, the lawsuit is more targeted than Brantley, which included multiple programmers and video distributors as defendants; Cablevision has narrowed the focus to claims against one major programmer by one major MVPD.

Political pressure is also being applied to require programmers to offer the networks it owns to distributors on an à la carte basis, as well as in packages. Senator John McCain introduced bill S.912, the Television Consumer Freedom Act of 2013, which is aimed at undoing forced bundling by programmers, among other things. Part of the impetus for the bill is a recent FCC pricing survey that compared the increase in the price of the expanded basic cable tier to the increase in the Consumer Price

61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
Index ("CPI") from 1995 to 2011. During that time, the price of expanded basic packages increased at a compound annual rate of 6.1% compared to 2.4% for the CPI. It appears that Senator McCain believes that one reason cable prices are increasing at three times the rate of inflation is the ability of major programmers to offer pay-TV subscribers the option to purchase networks as bloated, highly priced bundles, rather than offering the option to purchase networks on an à la carte basis.

B. Challenges to Broadcasters

Broadcasters are facing technological and legal challenges to their standard way of conducting business on two fronts, each representing a major area of revenue generation. First, the most rapidly growing source of revenue, retransmission fees, is under assault in the high-profile lawsuit, *American Broadcasting Co., Inc. v. Aereo, Inc.* A second threat to a component of the broadcasters’ business model, revenue generation from advertisements, presented itself in the Ninth Circuit case *Fox Broadcasting Co.*, in which the court confirmed the legitimacy of technology designed to allow viewers to skip the ads bundled with a network’s programming.

1. Restransmission Fees

First, a brief primer on broadcasting technology and case law pertinent to Aereo’s entry into video distribution is presented. The delivery of television programming began when the federal government granted television broadcasters the right to use a slice of the electromagnetic spectrum without charge. With this license television broadcasters were able to broadcast a signal encompassing video programming to a given geographic area. In turn, the signal can be captured by an antenna on the rooftop of a home in the region, and transmitted to a television set within the home for free. This

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70. S. Derek Turner, *Combating the Cable Cabal: How to Fix America’s Broken Video Market*, FREE PRESS (May 2013), available at http://www.freepress.net/sites/default/files/resources/Combating_The_Cable_Cabal_0.pdf. It is a common rebuttal for programmers to explain that price increases reflect, in part, the increasing number of networks viewers have to choose from (typically over one hundred cable networks available in the expanded basic tier) while failing to mention that the average number of networks actually viewed is a small percentage of the networks supplied. *Id.*


73. *Annual Assessment*, supra note 9, at 83.

74. *Id.*

75. *Aereo*, 712 F.3d at 693.
can be done because such a performance of the broadcaster's signal is considered a private performance under copyright law.\textsuperscript{76}

In the 1950s, cable operators first entered the video distribution business by erecting a community antenna and capturing local broadcast signals.\textsuperscript{77} After constructing a physical network in a community, the cable operator was able to distribute all local broadcast signals to any home in the region that purchased a cable subscription.\textsuperscript{78} The cable operator’s distribution of the programming from a broadcast network is considered to be a public performance for which the cable operator may have to pay the broadcaster for the right to carry the broadcaster’s signal.\textsuperscript{79} Such a payment is called a retransmission fee.\textsuperscript{80} It represents the fee that the broadcaster receives from the cable operator for the public performance of the broadcaster’s signal by the cable operator.\textsuperscript{81}

Aereo, which launched February 2002 in New York City, can be viewed as an antenna rental technology service, designed to capitalize on the private performance exemption contained in copyright law, rather than operate as a video distribution service.\textsuperscript{82} As a result, the OVD is not obligated to pay local broadcasters for the transmission of broadcast signals.\textsuperscript{83} Aereo captures the over-the-air signals of broadcasters operating in a given region using a pool of centralized multiple mini-antennas, each assigned to a specific customer.\textsuperscript{84} For a monthly fee (under $15), the local signals are then streamed live to the customer’s residence over the Internet, and can be viewed on any of the customer’s internet-enabled devices.\textsuperscript{85}

Aereo argues that it is facilitating a customary practice for its customers to do what they have always been allowed to do legally, which is


\textsuperscript{78} Id.

\textsuperscript{79} Cable Television Consumer Protection and Competition Act of 1992, P. L. No. 102-385, 106 Stat.1460 (1992) (“Cable Act”). If a local broadcaster elects to utilize the must-carry option, the cable operator does not have to pay for the right to distribute the signal. \textit{Id.}

\textsuperscript{80} Annual Assessment, supra note 9, at 104.

\textsuperscript{81} Id.

\textsuperscript{82} A copyright owner possesses the right “to perform the copyrighted work publicly.” 17 U.S.C. § 106(4) (2012).

\textsuperscript{83} WNET v. Aereo, Inc., 712 F.3d 676, 692–93 (2d Cir. 2013).


\textsuperscript{85} Id.
to use a dedicated antenna to view over-the-air local broadcast signals for free.  

Broadcasters quickly responded to this new form of competition (which they have labeled as stealing) and sued Aereo in several jurisdictions (New York, Massachusetts, and Utah) for infringement of the broadcasters’ copyright-protected public performance rights.

To the broadcasters’ dismay, in April 2013, the Second Circuit upheld a denial of a preliminary injunction motion against Aereo by broadcasters in the Southern District of New York. Based on petitions for certiorari from both sides, the Supreme Court agreed to hear the case. If Aereo is found to provide a legal service, the business model of broadcasters is ripe to be fundamentally altered.

There have been very interesting reactions by broadcasters and distributors to Aereo’s early legal successes in fighting the preliminary injunctions. On one hand, Fox and CBS have threatened to convert their broadcast networks into pay cable networks to try and replace the loss of retransmission income if Aereo’s business model is found legal. Less dramatically, broadcasters could move some of their most valuable content, such as live sporting events, to pay cable networks. Major sports leagues, such as Major League Baseball and the National Football League, are supporting the broadcasters’ case, and have threatened to sell the rights to their games in the future only to cable networks (i.e., no more Super Bowl aired on a broadcast network).

On the other hand, some MVPDs are looking to incorporate the Aereo model into their way of conducting business to escape both the need to pay retransmission fees and to suffer through increasingly occurring

86. Id.
retransmission blackouts. Perhaps most significantly, the resolution of the case could have far wider implications than defining what the word "public" means, and who is required to make retransmission payments, since it involves using the Internet to access content which is the basis of a growing number of cloud-based storage businesses.

2. Advertising Revenue

In 2014, the Ninth Circuit allowed Dish Network to continue to market the Hopper, a centrally housed device that allows viewers to automatically skip commercials. The decision was rooted in the fair use standard, as was the Supreme Court's 1984 Betamax decision. This is but another example of a pattern emerging in which technological changes and legal decisions disrupt the traditional business model, allowing viewers to have increasing control as to when, where, how, and on what device they choose to enjoy video programming. Not surprisingly, broadcasters' displeasure with Dish's win has caused programmers to engage in hardball tactics in negotiations with the satellite video distributor over a new programming rights contract. In particular, two predictable stumbling blocks to contract negotiations are the Hopper technology and digital rights to programming.

C. Challenges to MVPDs

This section demonstrates that governmental regulations have the potential to determine, to a large extent, the ability of new entrants and existing players in an industry to be assured of access to a vital input, such as video programming. Regulations in two areas, one focused on OVDs and the second on any video distributor, promise to enhance competition in the distribution of video programming. First, MVPDs face new competitive challenges to their traditional dominance in video distribution from two types of OVD competition. One type involves the development

96. For example, see Brian Stelter, Disney and Dish Wrangle Not over Broadcast Fees, but the Future of TV, N.Y. TIMES (Nov. 3, 2013), http://www.nytimes.com/2013/11/04/business/media/disney-and-dish-wrangle-not-over-broadcast-fees-but-over-the-future-of-tv.
97. In the era of broadband technology capable of transporting video signals, contract negotiations between network owners and video distributors involve many dimensions, including rights to deliver programming (a) in the traditional linear manner, (b) in the form of on-demand access to programming, (c) as mobile access to programming, and (d) as viewing opportunities utilizing online platforms on many devices. See CHARLES B. GOLDFARB & KATHLEEN ANN RUANE, ONLINE VIDEO DISTRIBUTORS AND THE CURRENT STATUTORY AND REGULATORY FRAMEWORK: ISSUES FOR CONGRESS 16 (Sept. 11, 2012), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R42722_09112012.pdf.
of OVDs that utilize a similar structural model (i.e., linear prescheduled channels of programming) to the dominant form used by MVPDs. The second type involves the growth of OVDs that use an on-demand model for video distribution, such as Netflix, Amazon, and Apple. There is the possibility of multiple benefits from online competition, such as more choice in the selection of video programming as dictated by consumer demand, more wired and wireless devices capable of displaying video programming, the promise of further technological change in creation of video programming, the distribution of video programming, and intense price competition. The regulatory structure that has been created to govern business relationships in the television industry did not contemplate the ability to deliver video content, increasingly at higher speeds improving the quality of viewing, over the Internet. In addition, changes in consumer demand for video programming from linear to on-demand viewing also provides a need to amend the prevailing regulatory framework.

The FCC is faced with the challenge of how to incorporate the new types of Internet-based competition into its regulatory framework. One opportunity for the FCC to increase video distribution competition centers on a program access complaint filed in March 2010 by an OVD upstart called Sky Angel. Sky Angel offers an MVPD-like subscription-based service, which includes a package of cable networks, such as MLB Network, Hallmark Channel, and the Weather Channel. Its mission is to be a video distributor of faith-based, family-friendly programming. A subscriber to Sky Angel's service uses his or her own broadband Internet connection to receive the video content offered by Sky Angel. Thus, Sky Angel is only the distributor of the video programming and not a vertically integrated MVPD that bundles content distribution and transmission. The ability to unbundle content from transmission is a result of technological innovations in digital and broadband technologies.

Sky Angel's complaint alleges that Discovery, a major programmer, engaged in discriminatory conduct by denying access to several networks (including Animal Planet and Discovery) that it judges to be critical to its competitive viability as an online video distributor. The FCC issued a Public Notice in March 2012 to address issues implicated in the dispute.

98. *Sony Corp. of Am.*, 464 U.S. at 417.
100. Id.
103. Id.
centering on how to classify OVDs. In order to have legal access to the FCC's program access complaint process, the complainant must be classified as an MVPD. One key issue for the FCC is to determine if, in order to be classified as an MVPD, an OVD must provide the two elements that a traditional MVPD provides: (1) The physical connection/transmission path, and (2) the video content that is distributed. Sky Angel only provides the second element whereas traditional MVPDs provide both elements.

While this may seem to be a simple question, in reality, the FCC must incorporate into its analysis statutory language and previous regulatory decisions written in the context of the existing technology of the day, and not in terms of what is possible today. Two different functions are involved: Content provider (i.e., a video distributor) and transmission provider. Until the development of the Internet, in the case of video, these two functions were provided by the same vertically integrated company. In order to facilitate competition in video distribution, it should be recognized that the two services are distinct and no longer inextricably intertwined. Whatever the decision the FCC makes will determine, to a large extent, the fate of OVDs that utilize the linear programming model of MVPDs. Legal scholars differ on whether it is a good idea to classify OVDs that are similar to Sky Angel as OVDs.

The FCC directly addressed issues involving OVD access to video programming in the Comcast-NBCU merger conditions. The vertical merger involved Comcast, the nation's leading MVPD and Internet Service Provider, and NBC Universal, one of the big six video programmers. In the approval of the merger, the FCC established new ground rules (lasting

104. Id.; see also Public Notice, Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, 27 FCC Rcd. 3079 (2012).
105. Sky Angel Complaint, supra note 100.
106. Id. at 3081–82; see also Media Bureau Seeks Comment, 27 FCC Rcd. 3079 (2012); see also GOLDFARB & RUANE, supra note 98.
107. Sky Angel Complaint, supra note 100, at 3081.
109. Id.
110. For example, on one hand, it is argued that "[t]he FCC should classify OVDs that provide multiple scheduled channels of video programming as MVPDs." Note, Enabling Television Competition in a Converged Market, 126 HARV. L. REV. 2083, 2098 (2013). On the other hand, it is argued that "[t]he FCC should uphold the Media Bureau’s decision [denying MVPD classification] in the Sky Angel complaint regarding the definition of ‘MVPD.’" Seth Cooper, Keep Online Video Free from FCC Regulation, 7 PERSPECTIVES FROM FSF SCHOLARS 1, 4 (Sept. 14, 2012), available at http://www.freestatefoundation.org/images/Keep_Online_Video_Free_from_FCC_Regulation_091412.pdf.
112. Id.
up to seven years) for treatment of OVDs that surpass, in terms of obligations on the part of Comcast, the program access rules that had governed a vertically integrated cable operator’s conduct toward unaffiliated video distributors. The conditions agreed to by Comcast also demonstrate how the FCC can use its merger authority to impose obligations that go beyond those attainable in a general rulemaking. Effectively, OVDs achieved the status of equals to MVPDs in their ability to access Comcast's programming.

The FCC concluded in the Comcast Merger Order that the joint venture between Comcast and NBCU has the incentive and ability to engage in anticompetitive acts against OVDs. This was more than a merely theoretical conjecture since the FCC discovered evidence that Comcast considered the threat of OVDs to be real. For instance, the FCC states that “[t]he record here is replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it.”

To counter the possibility of discriminatory conduct, two targeted conditions on the joint venture’s conduct as a programmer toward OVDs were enacted. First, the FCC required that Comcast-NBCU “offer its video programming to any requesting OVD on the same terms and conditions that would be available to a traditional MVPD.” This requirement would typically involve a linear, prescheduled delivery of programming along the lines utilized by Sky Angel. The linear model is likely to be less frequently used by OVDs than the on-demand model, which has developed and evolved in response to changes in consumer demand for viewing video content.

A second merger condition is based on the principle that the joint venture should behave toward video distributors in a similar manner to a

113. Id.
114. An unfavorable perspective on this use of FCC merger authority argues that, “[t]he Commission’s Comcast-NBCU order represents an unprecedented regulatory shakedown of a company that obviously would have done just about anything to gain approval of the deal.” Adam Thierer, Comcast-NBC & the FCC’s Unprecedented Merger Shakedown, TECH. LIBERATION FRONT (Jan. 20, 2011), http://techliberation.com/2011/01/20/comcast-nbc-the-fccs-unprecedented-merger-shakedown.
115. Comcast Merger Order, supra note 112.
116. Id.
117. Id. One example of Comcast’s reaction to the threat of OVD competition is the creation of its own OVD, called “TV Everywhere,” in which it provides online access to many of the networks it offers with its MVPD service but only if the subscriber has a pay-TV subscription. In short, Comcast and other MVPDs tie access to online video programming to a pay-TV subscription. See also, Ammori, supra note 3, at 20.
118. Comcast Merger Order, supra note 112.
119. Id.
leading programmer who operates on a stand-alone basis. The influence of Comcast as a video distributor is then taken out of the equation for how content agreements are negotiated. The FCC states that, "[s]pecifically, once an OVD has entered into an arrangement to distribute programming from one or more Comcast-NBCU peers, we require Comcast-NBCU to make comparable programming available to that OVD on economically comparable terms."120 This kind of programming is demonstrated by how an on-demand OVD (such as Netflix, Apple, and Amazon) would like access to satisfy changing consumer demand. Specifically:

[I]f an OVD receives each episode of five primetime television series from CBS for display in a subscription VOD [Video on Demand] service within forty-eight hours of the original airing, the [Joint Venture] must provide the OVD a comparable set of NBC broadcast television programs, as measured by volume and economic value, for display during the same subscription VOD window.121

As consumers demonstrate an increasing preference for on-demand access to original and rerun programming, this condition holds the promise of facilitating the economic viability of on-demand OVDs. In addition, these merger conditions could serve as the standard for addressing programming access in future mergers involving vertically integrated media companies.

Another area of regulation addresses circumstances in which a vertically integrated cable operator possesses the incentive and ability to engage in anticompetitive conduct against rival distributors through the use of exclusive contracts. A specific source of continuing concern is competitors’ access to RSNs. Exclusive contracts between video programmers and video distributors can have procompetitive and anticompetitive effects. Because of the need to balance the benefits with the costs of exclusivity, the FCC substituted the ban on exclusive contracts with a case-by-case analysis of the legality of an exclusive contract between a cable operator and a cable-affiliated programmer; thus, the FCC allowed the sunset of the previous ban, as established in the Cable Act of 1992 on exclusive contracts covering all cable-affiliated programming.122 The change from a ban to a case-by-case consideration of exclusive

120. Id.
contracts shifted the burden of proof from cable operators to competitors in programming access disputes.

Although cable market power at the national level is diminishing, there remains a continuing concern about cable market power in individual geographic markets where cable operators have clustered their systems.\textsuperscript{123} Cable operators (such as Comcast, Time Warner, Cablevision, and Cox) frequently control RSNs that are viewed as must-have programming which can have a significant effect on local video distribution competition. The distinguishing characteristics of such regional sports programming are (1) non-replicable and (2) critically important to consumers.\textsuperscript{124} Thus, for a vertically-integrated cable operator, the combination of a dominant regional market share, and control of must-have programming, facilitates the exercise of market power using exclusive contracts.\textsuperscript{125}

In order to lessen the burden of proof on complainants in the case of access to programming from RSNs, the FCC has made or proposed procedural assumptions in the case-by-case complaint process. The goals of these assumptions are to make it somewhat easier for video distribution rivals to gain access to such programming.

Consider the case of a cable operator that enters into an exclusive contract with a cable-affiliated RSN but a rival video distributor desires access to the programming of the RSN, no doubt in light of its must-have nature and its critical importance to consumers' subscription decisions.\textsuperscript{126} The rival files a complaint about the exclusive contract alleging a violation of section 628(b) of the Cable Act.\textsuperscript{127} The complainant bears the burden of proof to establish that the contract at issue possesses two elements: (1) The contract is “unfair” based on the facts and circumstances presented; and (2)
the contract has the "purpose or effect" of "significantly hindering or preventing" the complainant from competing.\textsuperscript{128}

The FCC has established or proposes to establish a rebuttable presumption for each element in the complaint process that incrementally makes it easier for the complainant to prevail in such cases. The FCC has established a rebuttable presumption that an exclusive contract between a cable operator and a cable-affiliated RSN satisfies element (2).\textsuperscript{129} For element (1), the FCC proposes to establish a similar rebuttable presumption.\textsuperscript{130} Use of presumptions is likely to slightly tip the scales of justice to the side of opening access to must-have programming in regional markets where cable operators possess significant market power.

\section*{IV. Conclusion}

This is an exciting time for the television industry. Viewers enjoy increased freedom to decide when, where, how, and on which device to watch television programming. New programmers and video distributors are discovering profitable niches in the industry. However, the traditional business model for the industry in which major programmers bundle multiple cable and broadcast networks together, generating large licensing and retransmission consent fees, which, in turn, are passed on to viewers through their cable, satellite, or telephone MVPD, is becoming unsustainable. Technological changes have made it economically and technically feasible to be a stand-alone video distributor without ownership of the underlying transmission network that transmits the video programming. Online video distributors offer a real competitive threat to incumbents for linear and on-demand programming and are gaining interest and dollars from viewers. Across the industry, the demand for access to unbundled video programming is growing. Access to video programming or access in the format (i.e., online) that a viewer chooses is in high demand. This demand is evident by an increasing number of legal, technological, economic, and political challenges to the traditional business model of the television industry. Many incumbents in the industry will fight disruption to the traditional ways of doing business. They may be successful in slowing down the evolution of a new business model but change is inevitable.

\begin{footnotesize}
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\item \textsuperscript{128} Revision, supra note 123.
\item \textsuperscript{129} Id. In 2010, the presumption was established for terrestrially-delivered RSNs and in 2012, it applies regardless of what technology is used to deliver the programming.
\item \textsuperscript{130} Id. The FCC has also requested comments on several other issues that could make access to sports programming at the regional and national levels easier for video distribution competitors.
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